SUBJECT INDEX

	Page
Questions Presented	1
Petitioner Improperly Denied Respondent His Constitutional Right to Jury Trial	2
The Court of Appeals Correctly Ordered Transfer of Respondent's Case	6
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases	Page
Beacon Theaters v. Westover, 359 U.S. 500	5
Castner v. First National Bank, 278 F. 2d 376	6
Cord v. Smith, 338 F. 2d 516	8
LaBuy v. Howes Leather Co., 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. 290	9
Long Beach Federal Savings & Loan v. Federal Home Loan Bank Board, 189 Fed. Supp. 589	7
Mitchell v. United States, 126 F. 2d 550, cert. den. 62 S. Ct. 1307, 316 U.S. 702, 86 L. Ed. 1771, reh. den. 65 S. Ct. 855, 324 U.S. 889, 89 L. Ed. 1436	6, 7
Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F. 2d 804, cert. den. 375 U.S. 821	8
United States v. Ritter, 273 F. 2d 30	9
Whitaker v. McLean, 118 F. 2d 596	6

Rules	
Rule of the Supreme Court of the United States, Rule 19	1
Federal Rules of Civil Procedure, Rule 38(a)	4
Federal Rules of Civil Procedure, Rule 38(b)	2
Federal Rules of Civil Procedure, Rule 56	5
Federal Rules of Civil Procedure, Rule 81(c)	2

Statutes	
United States Code, Title 28, Sec. 144	1, 9, 10
United States Code, Title 28, Sec. 1651	2, 9, 10
United States Code, Title 28, Sec. 2106	9, 10
United States Constitution, Seventh Amendment	4

IN THE

Supreme Court of the United States

October Term, 1966
No. 936

HONORABLE THURMOND CLARKE, Chief Judge, United States District Court, Central District of California,
Petitioner,

vs.

WILLIAM G. YAX,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

Questions Presented.

The Petition for Writ of Certiorari presents the question whether one has a constitutional right to trial by jury in an action for breach of contract. The Complaint in the court below includes a cause of action for breach of a contract implied-in-fact arising from the conduct of the parties and a further cause of action for breach of an express contract found in an exchange of correspondence and other documents. Also questioned by petitioner is the authority of the Court of Appeals to direct transfer of a case from one District Court judge to another other than through a proceeding instituted under 28 U.S.C. 144. Neither question is unique, none of the factors outlined in Rule 19 of this Court applies, and nothing is brought forth which requires resolution by this Court. Denial of the petition is in order.

Petitioner Improperly Denied Respondent His Constitutional Right to Jury Trial.

The controversy arose in the District Court in conjunction with respondent's suit against Polaroid Corporation for breach of contract. After removal by Polaroid from the state court, respondent made timely demand for a jury trial under Rules 38(b) and 81(c), Federal Rules of Civil Procedure, which was done particularly in view of the inherently numerous factual issues involved in an implied-in-fact contract, and the many factual determinations necessary in establishing the breach of the express contract that came about from the exchange of documents between the parties. The demand for jury trial was never waived. Nevertheless, petitioner arbitrarily denied this right to respondent on the date set for trial, ordering the case to proceed in its entirety without a jury. Respondent refused to proceed because of this invasion of his Constitutional right, whereupon Polaroid was allowed by petitioner to introduce certain documents into evidence and to present arguments to the court. Before petitioner rendered his decision, respondent filed a Petition for Writ of Mandamus under 28 U.S.C. 1651. It was imperative to proceed in this manner because of the amount of time that would have been necessary in an appeal, and the advanced years and ill health of the respondent. In view of the infirmities of the respondent, undue delays may well mean that he never is afforded his day in court. The Court of Appeals for the Ninth Circuit granted the petition, directing that respondent be granted a jury trial and that the case be assigned to another District Court judge.

The denial of the jury trial did not occur in the absence of counsel for the defendant, nor did it relate only to portions of the matters to be tried, as might be inferred from petitioner's brief. Instead, petitioner in open court, in the presence of Messrs. Johnston and Tackabury, attorneys for Polaroid, categorically stated that he would try all issues in the case without a jury, regardless of the repeated objections raised by respondent's counsel. The directive was expressed over and over by petitioner. The following are a few examples from the Reporter's Transcript of the Proceeding of petitioner's repeated assertions that he would proceed to try all issues without a jury [Tr. p. 22]:

> "Mr. Carr: What about the damages, Your Honor? That is an issue in the case.
>
> "The Court: Well, I will have to try everything. You are here. That is the only way I know to do.
>
> "Mr. Carr: Well, if we are entitled to a jury trial, why can't this matter be set over as you indicated originally?
>
> "The Court: Well, I would put it over to October 4th, but Mr. Johnston says he has his witnesses here and wants to proceed."

The Transcript continues, page 23:

> "The Court: I will order the matter to proceed without a jury. Counsel made the objection, you insist on a jury, and I will have to overrule the objection. We are here and ready and we will proceed."

Again, at page 27 of the Transcript:

> "The Court: Well, I have to try everything. I have to try everything."

Petitioner indicated that jurors were not at that moment available, but would be available in about two weeks. He denied a continuance of appropriate duration until jurors could be obtained (or even a continuance until the afternoon of the same day), instead directing that the matter proceed then and there. He went forth without a jury simply because defendant Polaroid did not wish to submit the case to a jury and wanted to go ahead without a jury at that time. On this ground, the respondent was denied his Constitutional right to a jury trial.

Denial of a jury trial clearly was improper because of the provisions of the Seventh Amendment to the Constitution, which states,

> "In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved . . ."

This Constitutional provision is expressly noted in Rule 38(a), Federal Rules of Civil Procedure, which states,

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Respondent's action in the District Court manifestly is one at common law and is of a nature which has been triable by jury for a time long antedating the adoption of the Seventh Amendment to the Constitution. Consequently, when the jury trial had been demanded by respondent, and this demand never had been waived, petitioner acted improperly in refusing to permit respondent to have a trial by jury.

Petitioner has recognized that the case involved triable factual issues. This came from petitioner's denial of a Motion for Summary Judgment brought by defendant Polaroid Corporation. This motion was made after the pretrial record was complete, with discovery having been terminated and all depositions filed. When issues of material fact remain to be resolved, a motion for summary judgment should be denied.

Rule 56, Federal Rules of Civil Procedure.

Petitioner denied the motion that Polaroid Corporation had brought, thereby recognizing the presence of the factual matters in the case.

The transcript makes it clear that respondent was not proceeding with a trial of legal issues alone, to convene a jury later for resolution of remaining factual issues. Even if petitioner had been doing so, however, he would have acted improperly. It is not permissible to try an action piecemeal and in the absence of a jury for portions of the trial. That question unequivocally was laid to rest by this court in *Beacon Theaters v. Westover* (1959), 359 U.S. 500. There it was declared an abuse of discretion to order that portions of a trial would be conducted without a jury and others with a jury where the case was partially in law and partially in equity. When it is not appropriate under those circumstances, *a fortiori* it is improper in the present common law action where no equitable issues are present. Consequently, it is baseless to assert that respondent should not be accorded the jury trial he has demanded.

The Court of Appeals Correctly Ordered Transfer of Respondent's Case.

The Order of the Court of Appeals directing transfer to a different judge is nothing of particular consequence and clearly is within the authority of the Court of Appeals. No one is being deprived of any rights, and the court is merely saying that the respondent's case shall be heard before one judge instead of another. Each District Court judge has the same power as all the others, so the rights of both plaintiff and defendant are being preserved.

> *Castner v. First National Bank* (C.A. 9 1960), 278 F. 2d 376.

This is merely a precautionary move on the part of the Court of Appeals in order to make certain not only that respondent in fact receives an impartial trial, but also to preserve the appearance of justice so important in our system of law. As it was expressed in *Whitaker v. McLean* (C.A. D.C. 1941), 118 F. 2d 596.

> ". . . the courts of the United States 'shall not only be impartial to the controversies submitted to them but shall give assurance that they are impartial'; i.e., shall appear to be impartial. Berger v. United States, 255 U.S. 22, 34, 41 S.Ct. 230, 234, 65 L. Ed. 480 . . . a right to be tried by a judge who is reasonably free from bias is a fundamental right to a fair trial."

In a similar vein, the court stated in *Mitchell v. United States* (C.A. 10 1942), 126 F. 2d 550, 552, cert. den.

62 S. Ct. 1307, 316 U.S. 702, 86 L. Ed. 1771, rehearing den. 65 S. Ct. 855, 324 U.S. 889, 89 L. Ed. 1436,

> ". . . it is the duty of all courts . . . to guard against any appearance of personal bias or prejudice which might generate in the minds of the litigants a well-grounded belief that the presiding judge is for any reason personally biased against their case."

In *Long Beach Federal Savings & Loan v. Federal Home Loan Bank Board* (D.C. Cal. 1960), 189 Fed. Supp. 589, it was stated,

> ". . . the right to an impartial judge or quasi-judicial officer free from bias, prejudice, interest or other ground of disqualification is a fundamental right protected by the due-process clause of the Fifth Amendment, and thus a constitutional right . . ."

There are many factors present in the proceedings below which make transfer important and which mean that only when this is done will the case withstand critical scrutiny as an example of obvious neutrality. Petitioner was represented before the Court of Appeals by the same counsel who served for defendant Polaroid. Petitioner would be presiding over a case contested between counsel who have championed petitioner and counsel who have questioned his actions. At the hearing before the Court of Appeals, counsel for petitioner indicated that Polaroid (whom they also represent) probably would resubmit to the court the motion for summary judgment. Only by granting such a motion would petitioner substantiate the claim of his counsel that his ruling at the abortive trial was supposed to

be a segregation of legal issues for the court's determination alone, rather than an actual denial of a right to jury trial. Petitioner would be placed in an almost impossible situation if required to further conduct respondent's trial, one in which any man could scarcely prevent himself either from feeling motivations of retribution or from overcompensating and favoring petitioner at the expense of Polaroid. A strictly neutral trial requires that neither consideration should influence the outcome.

The Court of Appeals has exercised its power to transfer from one judge to another in other instances without challenge. In fact, twice before in reported decisions the same Court of Appeals has found it appropriate to direct assignment of cases away from this same petitioner.

Tanner Motor Livery, Ltd. v. Avis, Inc. (C.A. 9 1963), 316 F. 2d 804, cert. den. 375 U.S. 821;

Cord v. Smith (C.A. 9 1964), 338 F. 2d 516.

Now that it has occurred for the third time, petitioner has been prompted to file the petition for writ of certiorari. While it is quite understandable that petitioner may feel vexation upon the transfer of the case from his control, there is no effort whatsoever to criticize petitioner, and it is expressly recognized that he is a man of ability and high principles. As the Court of Appeals stated in its Order of October 26, 1966,

> "This order for reassignment is in no sense a suggestion that impugns the character or judgment of respondent, the Hon. Thurmond Clarke, but is to avoid placing him in an awkward position; and so

> as to observe, not only the fact, but the appearance of granting to the litigants an impartial tribunal for the settlement of their differences."

The authority of the Court of Appeals to effect the transfer arises not only under the all-writs statute, 28 U.S.C. 1651, but also may be found in 28 U.S.C. 2106 and the powers necessarily residing in a court of appellate level. As expressed in *United States v. Ritter* (C.A. 10 1959), 273 F. 2d 30, 32,

> "But we have no doubt of our power and inescapable duty to grant the relief sought, whether it be found in the all-writs statute or in the exercise of the inherent powers of appellate jurisdiction to effectuate what seems to us to be the manifest ends of justice. See LaBuy v. Howes Leather Co., supra."

In the *LaBuy* case, 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. 290 (1956) this Court stated,

> "We believe that the supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here."

The respondent is not bypassing 28 U.S.C. 144 in obtaining the order of the Court of Appeals as a result of the Petition for Writ of Mandamus. He merely is securing his relief through another route made virtually compulsory by his age and physical condition. There is nothing in 28 U.S.C. 144 to indicate that it is the only way to secure assignment from one judge

to another. Neither does 28 U.S.C. 144 purport to supplant or modify 28 U.S.C. 1651 or 28 U.S.C. 2106. On the contrary, the proper functioning of our judicial system requires that courts of appellate jurisdiction exercise the control exemplified in the proceedings that have taken place.

Conclusion.

Consequently, it is respectfully submitted that the respondent is constitutionally entitled to his trial by jury and that the Court of Appeals for the Ninth Circuit acted with complete propriety in directing the transfer to a different judge. Over a year has passed since the date respondent's case originally was scheduled for trial, with repeated delays occurring through no fault of respondent. A speedy resolution of this petition followed by a prompt trial of the issues between respondent and Polaroid is a necessity if respondent is to have an opportunity to litigate his grievance.

Denial of the Petition for Writ of Certiorari is respectfully requested.

Respectfully submitted,

MUNSON H. LANE,
GAUSEWITZ & CARR,
RICHARD F. CARR,
Counsel for Respondent.